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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BAY4 CAPITAL,

Plaintiff and Appellant,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,

Defendant and Respondent.

2d Civil No. B210281
(Super. Ct. No. CV70044)
(San Luis Obispo County)

The State of California entered into an agreement with Western Blue Corporation (Western Blue) to provide computer equipment to state agencies. An agency could acquire equipment by issuing a purchase order (PO) to Western Blue. Respondent, California Board of Trustees of the California State University (Cal Poly), issued a PO for computer equipment, which Western Blue provided pursuant to a three-year lease. Western Blue then assigned its rights to the PO to another contractor who, in turn, assigned the PO to appellant Bay4 Capital, LLC (Bay4).

Prior to the expiration of the lease, Bay4 informed Cal Poly that it could purchase, continue to lease or return the equipment. Cal Poly responded that it would own the equipment at lease expiration. It also claimed that its lease was with Western Blue and it had no contractual relationship with Bay4. Cal Poly retained the computer equipment without payment.

Four years later, Bay4 filed a breach of contract action against Cal Poly, who moved for summary judgment on the grounds that Bay4 (1) had failed to comply with governmental claims procedures; (2) lacked standing; and (3) had not provided notice of the lawsuit. The trial court granted the motion, ruling that Bay4 had failed to provide sufficient notice of potential litigation to Cal Poly, thus the action was barred by the statute of limitations. We affirm.

FACTS

The Department of General Services (DGS) entered into contracts for products and services on behalf of various state agencies. Under a master rental agreement (MRA), a state agency could lease computer equipment from certain contractors through the issuance of POs. One such contractor was Western Blue.

On March 19, 1997, Western Blue entered into MRA 6-97-70-01 with DGS, under which Western Blue agreed to fulfill POs for leases of computer equipment. The MRA provided that Western Blue could not assign the contract without the written consent of the State. Cal Poly issued a series POs under the MRA for the lease of computer equipment. It issued PO M104333 on April 21, 2000, for 157 computer workstations. The lease for that PO ran for three years, from June 15, 2000 to June 14, 2003. It is this PO that gave rise to the parties' dispute.

Assignments

Western Blue customarily assigned POs to a separate entity. The series of assignments leading up to the instant lawsuit is convoluted and reveals that Western Blue (with DGS' approval) assigned the leasing and financing functions to two separate entities. Convergent Capital Corporation (Convergent) served as lessor and purchased the computer equipment for the state agency. Key Municipal Finance (Key) provided financing and collected the lease payments.

Despite the assignments, Western Blue remained the prime contractor under the MRA. Convergent retained title and ownership of the equipment, and all payments after the expiration of the lease term (including buy-outs) were to become Convergent's property.

Convergent was purchased by C3 Capital Corporation which changed its name to Bay4. Key assigned its right to payment to Bay4, enabling Bay4 to collect Cal Poly's lease payments. However, the notice of assignment from Key to Bay4 was not signed by DGS.

Lease Expiration

The dispute arose in early June 2003, prior to the expiration of Cal Poly's lease on June 14. At that time, Bay4 approached Cal Poly and inquired whether it intended to purchase, continue to lease or return the equipment. Cal Poly responded that it had a $1 purchase option and would own the equipment at lease expiration. Over the next three years, the parties exchanged a series of emails disputing whether Cal Poly owed Bay4 monies at the expiration of the lease term. The communications between Cal Poly, Western Blue and Bay4 concerning this matter are memorialized in a series of emails. We quote them in detail because their language is relevant to the issue of notice, the ground upon which the trial court granted Cal Poly's motion for summary judgment. Of particular importance are the emails sent on June 6 and June 10, 2003, and a letter dated July 25, 2005.

On June 6, 2003, a Bay4 employee sent Cal Poly the following email: "I'm not sure if you remember me, but we are also known as C3 Capital Corporation, and we have some leases with your organization. [¶] Lease Order M104333 is coming to the end of its firm term, and I wanted to see if you will be purchasing the equipment, continuing to lease, or returning the equipment. I will be happy to provide the quote for you. Please let me know what information you need! [¶] I look forward to hearing from you!"

On June 9, 2003, Cal Poly sent Bay4 an email stating that the PO was a lease/purchase contract and that Cal Poly would own the computer workstations at lease expiration. It directed Bay4 to contact Western Blue with any questions. On the same day, Bay4 contacted Western Blue and asked for more information about the contract. Bay4 indicated that Cal Poly did not believe it had a market value lease.

On June 10, 2003, Western Blue emailed Bay4 and stated that it had confirmed that Cal Poly had a market value lease. The email read: "We pulled the copy of the order and it says that it is [a] Market Value Lease. We pulled some information from the DGS (State of California) website [concerning market value and $1 buyout leases]. I am pasting that into this e-mail."

On June 10, 2003, Western Blue emailed Cal Poly stating that the lease was a fair market value lease. It read: "The paperwork for this order indicates that this is a Fair Market Value Lease. The following information defines the Fair Market Value Lease verse [sic] the $1 Buy-out. [¶] [Attached is] an Excel spreadsheet that shows the equipment list for this lease. This lease expires 7-18-03.[1] You many [sic] continue to rent this equipment on a month-to-month basis past the end of your lease. You would continue to make your payments as you have been doing. [¶] If you choose to terminate this lease at the lease expiration of 7-18-03, you must give 30 days written notice to Bay4 Capital. . . ."

Over the next two years, Cal Poly, Western Blue and Bay4 continued to correspond, disputing the nature of the lease.

On July 25, 2005, Western Blue notified Cal Poly by letter that Cal Poly did not have a $1 buy-out option. Western Blue stated that, under the terms of the MRA, Bay4 acquired the rights to the lease when it purchased Convergent. Western Blue indicated that the lease rate in the PO corresponded to the lease rate in the quote Western Blue had originally provided Cal Poly, both of which were consistent with a fair market buy-out. Western Blue asserted that, because Cal Poly "did not exercise any purchase options[, Cal Poly] owe[s] Bay4, the owners of the equipment and the lease, continuing rental and [Cal Poly] still must return the equipment."

In January 2006, Bay4 sent a letter informing Cal Poly that the PO was not a $1 buy-out. On February 1, 2006, Cal Poly sent Western Blue a letter maintaining that it did not owe Bay4 any lease charges and was "addressing our

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[1] The date of July 18, 2003, appears to be a typographical error. It is undisputed that the lease expired on June 14, 2003.

response to [Western Blue], as Western Blue is identified by the Cal Poly [PO] as our prime contractor, and therefore Western Blue has the responsibility to administer the agreement."

On March 15, 2006, Cal Poly sent Western Blue an email stating that Cal Poly would not continue discussions with Bay4 without Western Blue's participation. Bay4 attempted to utilize DGS's dispute resolution procedures outlined in the MRA. DGS determined that Bay4 had not established that it had a contractual relationship with DGS or Cal Poly, thus it was not entitled to dispute resolution under the MRA. Bay4 then filed a claim with the California Victim Compensation and Government Claims Board, which was rejected.

Complaint

On January 19, 2007, Bay4 filed a complaint against Cal Poly for breach of contract and wrongful possession of personal property. It sought damages in the amount of $484,439.20 or, in the alternative, possession of the computer equipment.

In its complaint, Bay4 alleged that it had fulfilled all the PO's issued by Cal Poly, and Cal Poly was required to pay it $121,109.80 annually for the use of the computers. Bay4 asserted that, beginning in June 2003, Cal Poly had refused to make its annual payments; had not returned the equipment to Bay4; and erroneously claimed it has a $1.00 purchase option. Bay4 alleged that Cal Poly originally requested a $1 buy-out at the end of the lease term, rather than a fair market value buy-out and that Western Blue informed Cal Poly that a $1 buy-out was not an option under the MRA.

Motion for Summary Judgment

Cal Poly answered and moved for summary judgment or, in the alternative, summary adjudication. It alleged that the action was barred because (1) Bay4 failed to file a timely claim with the Victim Compensation and Government Claims Board; (2) Bay4 lacked standing because it was not a proper assignee of the PO; and (3) Bay4 failed to file its complaint within the two-year period set forth in the MRA. Bay4 filed opposition refuting Cal Poly's claims. Bay4 contended that it had alleged facts establishing that it had provided sufficient notice to trigger a four-year

statute of limitations under the MRA, or "at the very least," raise an issue of material fact concerning the timeliness of its claim.

Request for Supplemental Briefing on Issue of Notice

The motion for summary judgment was heard on March 13, 2008. At the hearing, the court requested supplemental briefing on whether Bay4 provided sufficient notice of the litigation to Cal Poly to trigger the four-year statute of limitations under the MRA.[2]

Bay4 submitted a brief indicating that the two-year statute of limitations under the MRA may be extended to four years if a party provides written notice of potential litigation. Paragraph 38 of the MRA provides:

"No action, regardless of form, arising out of this contract may be brought by either party more than *two years* after the injured party has knowledge, or should reasonably have had knowledge, of the fact which gave rise to such cause of action, or in the case of non-payment, more than *two years* from the date of last payment, except where either party (within two years after a cause of action[] has arisen) *provides the other party in writing a notice of a potential cause of action, disclosing all material facts then known by the notifying party concerning such cause of action*, then the notifying party may bring an action based on the matter so disclosed at any time prior to the expiration of *four years* from the time the cause of action arose." (Italics added.)

Bay4 argued that it gave adequate notice via Western Blue's June 10, 2003, email to Cal Poly stating that it had a market value lease, and not a $1 buy-out option. Thus, its lawsuit filed in January 2007 was timely because it fell within the four-year statute of limitations. It contended that it was only required to give notice of a "potential cause of action," but was not required to threaten suit or use the

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[2] In its designation of the record, Bay4 states that a minute order for the hearing on the summary judgment motion reflects that no court reporter was present. The record on appeal does not contain a copy of the minute order, so we are unable to determine what transpired at the hearing.

terminology "cause of action." It also claimed that its notice need not be reduced to a single writing.

In the alternative, Bay4 contended that even if its notice was somehow deficient, it nevertheless "substantially complied" with the notice provisions in the MRA requiring a statement of "material facts" of "potential cause of action." It cited its June 6, 2003, email informing Cal Poly that it had three options at lease expiration: to purchase, return, or continue leasing the equipment. Bay4 asserted that, taken together, the two emails constituted written notice of a "cause of action for breach of contract," extending the statute of limitations to four years.

Bay 4 argued that Cal Poly should be estopped from claiming the email from Western Blue did not constitute a written communication from Bay4. It contended that Cal Poly's argument was disingenuous because it had continually insisted on Western Blue's participation in the discussions regarding the dispute. As such, Western Blue might even have been considered its agent. Under these circumstances, Bay4 asserted that it would suffer a terrible injustice were Cal Poly allowed "to escape its obligations based on a fortuitous technicality" that Western Blue, rather than Bay4, was the author of the June 10, 2003 email. Lastly, Bay4 contended that it was not required to file a claim before initiating its lawsuit because the MRA was a government contract and therefore exempted from certain claim filing requirements pursuant to Public Contract Code, section 19100.

In its opposition, Cal Poly argued that the doctrine of substantial compliance was inapplicable. It acknowledged that contents of the July 26, 2005, letter from Western Blue to Cal Poly set forth all the material facts. However, that letter was untimely because the cause of action accrued in June 2003, thus the action was barred by the two-year statute of limitations. Cal Poly also pointed out that the June 6 and June 10, 2003, emails could not have been considered notice because they were sent prior to lease expiration, before any alleged breach of contract could have occurred.

Trial Court's Ruling

The trial court granted summary judgment in favor of Cal Poly on the ground that the action was barred by the two-year statute of limitations specified in the MRA.

The court concluded that the June 2003 email from Western Blue did not extend the statute of limitations to four years because it did not constitute a "'. . . notice of a potential cause of action, disclosing all material facts then known . . . concerning such cause of action . . . .'" The court described Western Blue's July 26, 2005, letter as the only communication that "arguably" could comply with the notice provision in the MRA, but it was sent more than two years after accrual of the cause of action.

The court rejected Cal Poly's arguments regarding standing and compliance with the California Victim Compensation and Government Claims Board. It indicated that it had requested the parties to brief the applicability of Public Contract Code, section 19100, but neither party had provided satisfactory authorities to allow it to determine whether the MRA was subject the code provision.

The court denied the motion on the issue of standing, concluding that the assignment from Key to Bay4 assigned only the right to payment, not the delegation of contractual duties, thus the assignment was not prohibited under the MRA.

DISCUSSION

Summary judgment is properly granted where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) A grant of summary judgment is subject to our independent review. (*Aguilar,* at p. 860.)

Under the MRA, Bay4 was required to provide Cal Poly notice of potential litigation. Bay4 relies on *Alliance Financial v. City and County of San Francisco* (1998) 64 Cal.App.4th 635, to argue that an "explicit threat" of a lawsuit is not required, and that notice need not be reduced to a single writing.

Alliance concerned compliance with statutorily-mandated government claims filing requirements. There, an action was brought against a parks and recreation department for unpaid invoices. The question was whether the complaint was subject to the claims filing presentation requirements under Government Code section 900, the Tort Claims Act. (*Alliance Financial v. City and County of San Francisco, supra*, 64 Cal.App.4th at p. 651.) The appellate court concluded that invoices and notices of payment due did not qualify as a claim. However, it held that the contents of two separate letters sufficed. The *Alliance* court determined that notice must include the information that "a cause of action has accrued because of the nonpayment, and that the failure to resolve the claim may result in litigation." (*Id.* at p. 646.)

Alliance is both procedurally and factually inapposite. It addressed compliance with statutorily-mandated notice requirements pursuant to the Torts Claim Act. The matter before us concerns the notice requirements as set forth in a contract. The MRA required written notice of a "'potential cause of action, disclosing all material facts . . . concerning such cause of action . . . .'" Bay4 relied on the June 10, 2003, email from Western Blue to claim the notice provision was satisfied. The email specified only that Cal Poly had a fair market value lease and enumerated three options at lease expiration. Western Blue did not demand payment, allege the existence of a breach or indicate that a dispute existed requiring resolution. It made no reference to a cause of action or nor did it suggest that nonpayment might give rise to a lawsuit.

Bay4's burden was to establish the existence of a triable issue of material fact that Cal Poly had notice of potential litigation. Relying on various emails, letters and telephone conversations falls short of this requirement. We also reject Bay4's claims that Western Blue was its agent. There is nothing in the record to support the assertion that they had formed an agency relationship. To the contrary, the record reflects the hopeless confusion of all the parties surrounding this lease.

Summary judgment was properly granted on the issue of notice. Bay4's action is barred by the statute of limitations. It is unnecessary for us to determine the

validity of the assignment from Key to Bay4 or whether compliance with government claims filing requirements was necessary.

The judgment is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Teresa Estrada-Mullaney, Judge

Superior Court County of San Luis Obispo

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